

STATE OF MONTANA
DEPARTMENT OF LABOR AND INDUSTRY
HEARINGS BUREAU

DEPARTMENT OF LABOR AND)	Case No. 127-2006
INDUSTRY, UNINSURED)	
EMPLOYERS' FUND,)	
)	
Petitioner,)	
)	FINAL AGENCY DECISION
vs.)	
)	
MARCUS T. CUNY,)	
D/B/A CUNY DRYWALL,)	
Respondent.)	

* * * * *

I. INTRODUCTION

On April 29, 2005, the Uninsured Employers' Fund of the Department of Labor and Industry (UEF) issued an order to Marcus T. Cuny directing him to cease operations in Montana using employees for whom he did not have Montana workers' compensation insurance coverage. On or about June 13, 2005, the cease and desist order was served on Cuny. On July 12, 2005, Cuny filed an appeal of the order. The matter was then transferred to the Department's Hearings Bureau for a hearing on the appeal.

Hearing Officer Anne L. MacIntyre conducted a hearing on the appeal on November 18, 2005. The hearing was conducted by telephone pursuant to the stipulation of Cuny and the UEF. Cuny appeared on his own behalf. Mark Cadwallader, Attorney at Law, represented the UEF. Cuny and Debra Smith, Auditor for the UEF, testified as witnesses. Exhibits 1 - 4, copies of documents from the UEF's administrative record, were admitted into evidence without objection. Cuny stipulated to certain uncontested facts contained in the UEF's prehearing outline, specifically those facts contained in paragraphs (a), (c), (d), and (e).

II. ISSUE

The issue in this case is whether the Department properly ordered Cuny Drywall to cease and desist operations in Montana, pursuant to Mont. Code Ann. § 39-71-507.

III. FINDINGS OF FACT

1. As of April 28, 2005, the provisions of Chapter 448, 2005 Laws of Montana (Senate Bill 108) became effective.

2. On April 29, 2005, Debra Smith, an employee of the UEF, ordered Marcus Cuny, doing business as Cuny Drywall, to cease and desist work. Exhibit 1.

3. Also on April 29, 2005, the UEF issued an audit report finding Cuny to be an uninsured employer during the period January 1, 2002 to December 31, 2004. Exhibit 2. The finding was based on Smith's determination that Cuny had employed certain individuals without Montana workers' compensation coverage. Those individuals were D.J. Bowen, Kyle Fraser, James Moses, Richard Mullenberg, and William St. John.¹ Smith found that these individuals were not legitimate independent contractors, and that Cuny was therefore required to provide workers' compensation coverage. Smith advised Cuny:

As your enclosed penalty notice states, you have 30 days from the date of the notice to appeal the status of the workers I determined to be employees to the Independent Contractor Central Unit.

4. Also on April 29, 2005, the UEF issued a penalty notice to Cuny, assessing a penalty of \$5,385.42 for his failure to carry workers' compensation insurance for his employees during the period January 1, 2002 through December 31, 2004. The notice stated:

Collection procedures will continue unless an appeal is received in writing. If you are appealing only the penalty amount, you may request

¹The testimony at hearing established that the individual identified in the UEF's audit report as William St. John was in fact named William St. Mark.

an **administrative review**. This must be done within 30 days from the date of this penalty notice or by 5/29/2005. . . .

If any of the amount assessed is related to independent contractor issues, you must request a DETERMINATION FROM THE INDEPENDENT CONTRACTOR'S [sic] CENTRAL UNIT IN WRITING BY 5/29/2005; OTHERWISE, THIS DECISION WILL BECOME FINAL.

[Emphasis in original].

5. The UEF mailed the audit findings and penalty notice to Cuny on or about April 29, 2005. Cuny received these documents about the time they were mailed. He attempted unsuccessfully to contact representatives of the agency by telephone. He did not appeal the documents or submit any written document contesting the findings.

6. On or about June 13, 2005, the cease and desist order was personally served on Cuny.

7. Cuny timely appealed the cease and desist order. Exhibit 4.

8. Cuny did not have a policy of Montana workers' compensation insurance during the audit period or thereafter. He did not do so because he believed his workers, except Bowen and Fraser, were subcontractors who qualified as independent contractors. Moses, Mullenberg, and St. Mark had independent contractor exemption certificates issued by the Department on November 9, 2000, March 30, 2004, and July 7, 2004, respectively. The exemption certificate of Moses expired on November 9, 2003. The other exemption certificates were still in effect at the time Smith issued her audit report on April 29, 2005. Bowen worked for Cuny for only a short time, and Cuny discharged him because he did not provide an independent contractor exemption certificate. He did not provide workers' compensation coverage for Fraser apparently because Fraser is his stepson.

IV. DISCUSSION AND ANALYSIS²

Cuny appealed only from the cease and desist order issued by the UEF. He did not appeal the penalty notice. Thus, the only issue before the hearing officer is whether the cease and desist order was properly issued.

Montana law requires employers to insure employees for workplace injuries by maintaining a policy of workers' compensation coverage. Mont. Code Ann. § 39-71-401. An employer that fails properly to comply with this requirement is considered an "uninsured employer." Mont. Code Ann. § 39-71-501. Montana law also requires the Department to order any uninsured employer it discovers to cease operations until it has obtained workers' compensation coverage. Mont. Code Ann. § 39-71-507. An uninsured employer is subject to monetary penalties. Mont. Code Ann. § 39-71-504. An uninsured employer that fails to comply with a cease and desist order issued by the Department is subject to criminal penalties. Mont. Code Ann. § 39-71-507(3).

At hearing, Cuny protested the actions of the UEF, questioning why he has been subjected to penalties when his workers had independent contractor exemption certificates. With respect to the workers who had exemption certificates, Cuny's objections are valid.

The cease and desist order is not valid with respect to the holders of independent contractor exemption certificates issued by the Department. Under the law in effect during the period of the audit, an independent contractor was able to apply to the Department for an exemption from the Workers' Compensation Act. Mont. Code Ann. (2003) § 39-71-401(3). If the Department approved the application, it was conclusive as to the status of the independent contractor. Mont. Code Ann. (2003) § 39-71-401(3)(c). Moses, Mullenberg, and St. Mark had independent contractor exemption certificates, and at least insofar as the Department's enforcement responsibilities are concerned, their status was conclusively established. The UEF, an organizational unit of the Department, may not order a business to cease operations based on the status of workers the Department has determined to be exempt from the requirements of workers' compensation coverage.

²Statements of fact in this discussion and analysis are hereby incorporated by reference to supplement the findings of fact. *Coffman v. Niece* (1940), 110 Mont. 541, 105 P.2d 661.

The UEF's representative maintained at hearing that the exemption certificates were issued by the Department with no meaningful inquiry into whether the workers were in fact independent contractors. The Department also maintained that changes in the law permitted the Department to inquire into the validity of the certificates, citing specifically the decision of the Montana Supreme Court in *Wild v. Fregein Construction*, 2003 MT 115, 315 Mont. 425, 68 P.3d 855 and changes enacted by the Montana Legislature that were effective on April 28, 2005. However, to hold that the Department can grant an independent contractor exemption but then subject an employer who relies on that exemption to criminal penalties is an absurd result.

Although it is true that the *Wild* decision held that the language of Mont. Code Ann. § 39-71-401(3) did not preclude a factual inquiry into whether a worker was in fact an independent contractor, that holding was made in the context of a benefits dispute that involved an injured worker, an employer, and a workers' compensation insurer, not an employer and the Department. Further, *Wild* was decided in April, 2003, well before the Department issued the exemption certificates of Mullenberg and St. Mark, and the Department could have conducted such an inquiry prior to issuance of those certificates. In addition, the rules adopted by the Department to implement the independent contractor exemption process prior to the 2005 changes in the law provided for suspension or revocation of exemption certificates, but there is no indication that the Department attempted to revoke the certificates of these workers prior to determining that Cuny was an uninsured employer.³

The intent of the legislative changes enacted in 2005 was indeed to place more of a burden on the Department to insure that exemption certificates are properly issued. However, the bill that enacted these changes provided that they applied to all applications for and renewals of exemption certificates submitted to the Department on or after April 28, 2005. Sec. 15, Ch. 448, L. 2005. The Department issued the exemption certificates in question here well before April 28, 2005, and has not undertaken the factual inquiry contemplated by the law.

Further, the process used by the UEF to determine that the exemption certificates were improperly issued did not comply with the statutory provisions that contemplate such determinations be made by the Independent Contractor Central Unit (ICCU). Mont. Code Ann. § 39-71-415. In this case, the UEF has made its

³The 2005 changes to the law also contained provisions for suspension or revocation of exemption certificates.

own worker status determination and attempted to place the onus of seeking a determination from the ICCU on Cuny. Under the statute, if the UEF believes an employer is improperly characterizing employees as independent contractors, it must bring the matter before the ICCU and obtain a determination prior to issuing a cease and desist order.

However, by his own admission at hearing, Cuny was an uninsured employer at least some time during the period of the audit. He employed D.J. Bowen and Kyle Fraser, and did not maintain a policy of workers' compensation insurance covering them for workplace injury.⁴ Although there is no evidence that Cuny continued to have employees at the time of the cease and desist order, or at the time of hearing, an order to Cuny to cease operations using employees without workers' compensation insurance is proper in view of his failure to cover his employees in the past. Therefore, the cease and desist order was validly issued.

V. CONCLUSIONS OF LAW

1. The Department of Labor and Industry has jurisdiction of this dispute. Mont. Code Ann. §§ 39-71-507 and 39-71-2401(2).

2. Marcus T. Cuny d/b/a Cuny Drywall is an uninsured employer because he employed D.J. Bowen and Kyle Fraser without maintaining a policy of Montana workers' compensation insurance coverage.

3. The Department of Labor and Industry properly ordered Marcus T. Cuny d/b/a Cuny Drywall to cease operations on learning that he was an uninsured employer.

4. The Department of Labor and Industry may not order an employer to cease operations based on work performed by individuals determined by the Department to be exempt from the requirement of workers' compensation coverage as independent contractors.

⁴The evidence does not establish whether Moses continued to work for Cuny after his exemption certificate expired in November 2003; thus it is possible that Moses was also an employee during a portion of the period of the audit.

VI. ORDER

The cease and desist order issued by the Uninsured Employers' Fund of the Department of Labor and Industry is affirmed to the extent it orders Marcus T. Cuny d/b/a Cuny Drywall to cease operations without obtaining workers' compensation coverage for any employees.

DATED this ____ day of December, 2005.

DEPARTMENT OF LABOR AND
INDUSTRY

By: _____
Anne L. MacIntyre, Hearing Officer

This final agency decision is signed by the Hearing Officer under authority delegated by the Commissioner of Labor and Industry. Any party in interest may appeal this decision to the Workers' Compensation Court within 30 days after the date of mailing of this Order as provided in Mont. Code Ann. § 39-71-2401(3) and Admin. R. Mont. 24.29.215(3). The Court's address is:

Workers Compensation Court
P.O. Box 537
Helena, MT 59624-0537
(406) 444-7794